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No. 80-2150

In the Supreme Court of the United States

October Term, 1980

DONALD FINNEGAN, *et al.*,
Petitioners,

vs.

HAROLD D. LEU, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Was Respondent Leu's removal of appointed employees of the Respondent Union, who serve at the will of the president of the Respondent Union, lawful under the Labor-Management Reporting and Disclosure Act of 1959?

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

The action before this Honorable Court arises out of respondent Harold D. Leu's discharge of fifteen (15) appointed business agents for respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 20 (hereinafter referred to as Union, JA at 3-7).[1] Respondent Union is a labor organization which represents workers in a fourteen (14) county area of northwestern Ohio (R. at 60). In December, 1977, an election for the presidency and other officers of the

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1. "JA" refers to the Joint Appendix. "R" refers to page references of the Appendix filed in the United States Court of Appeals for the Sixth Circuit.

Union pitted the slate of Harold D. Leu against the slate of incumbent Omar L. Brown (JA at 9). It is undisputed that that election was hotly contested, and that campaigning was vigorous for both slates (JA at 9). Respondent Leu was declared to be the victor in that election.

During the 1977 campaign which resulted in respondent Leu's election to the presidency of the Union, respondent Leu campaigned vigorously upon the issue of better representation for the rank-and-file membership of the Union. In fact, the primary issue in respondent Leu's campaign, and his primary campaign promise to the members of the Union, was that, if elected, he would improve the service and representation to the rank-and-file membership over that which had been provided under the previous Brown administration (JA at 14 and 23-25).

Such representation and service to the membership is the primary responsibility of appointed employees of the Union, known as business agents, who are to carry out that task pursuant to the policies and guidelines dictated by the president of the Union (JA at 12-13, Joint Exhibit 1 at 16 and R. at 71). The Bylaws of the Union, which were adopted by, and may be amended by a vote of the membership of the Union, provide that the president of the Union shall have authority to appoint, suspend, and hire business agents for the Union (Joint Exhibit 1 at 15, R. at 71). The Bylaws further provide that business agents shall be subject to all orders and directives of the president of the Union (Joint Exhibit 1 at 16, R. at 71). Thus, the membership of the Union through its enactment of the Union's Bylaws, has given the president complete authority over the employment of the Union's business agents.

Prior to taking office on December 30, 1977, respondent Leu determined that in order to carry out his campaign commitment to improve representation and service to the

rank-and-file membership of the Union, it would be necessary to replace many of the appointed business agents employed under the previous Brown administration (JA at 24). Respondent Leu based this determination upon his observations of the petitioners (Brown business agents and other business agents not parties to this action) in performing their duties for the incumbent Brown administration (JA at 24 and 27).

As a result of this determination, on January 3, 1978, respondent Leu informed the fifteen (15) appointed business agents that he was terminating their employment with the Union (JA at 11). At that time, Leu informed the business agents that he was terminating their employment with the Union based upon his belief that they were unable to fulfill his campaign commitments to the membership (JA at 24-25). Respondent Leu informed the business agents that he did not believe, based upon their performance under the previous Brown administration, that they could adequately represent and service the membership of the Union in the manner in which he believed that that task should be performed (JA at 22-23 and 24).

Respondent Leu did not at that time, or at any other time, expel or suspend or attempt to expel or suspend the business agents from their membership in the Union or interfere in any way with their exercise of their rights as Union members (JA at 14, 18, 20-21, 36-38, 41, 47-48).[2]

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2. Petitioners in their brief filed in this Court state that respondent Leu allegedly embarked upon a scheme to prevent petitioners from obtaining employment within the jurisdiction of the Union, and thereby, allegedly denied them their membership rights and caused them financial hardship (Brief of petitioners at 7-8). It must be noted however, that petitioners' complaint filed in the District Court made no allegations of such a nature, but rather alleged only that their rights under the Labor-Management Reporting and Disclosure Act of 1959 had been abridged by virtue

(Continued on following page)

Additionally, it should be noted that although respondent Leu discharged the fifteen (15) business agents who originally instituted this action, he did retain as business agents two (2) individuals who had served in that capacity under the Brown administration and who had supported incumbent Brown in his campaign (JA at 14-15).

Shortly after their discharges from their positions as appointed business agents of the Union, petitioners filed their complaint in the United States District Court for the Northern District of Ohio, Western Division, alleging that they had been discharged in violation of their rights under Sections 411(a)(1), 411(a)(2), and 529 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. Sections 411 and 529. Petitioners sought injunctive and monetary relief in the District Court (JA at 7). After a hearing upon petitioners' motion for a preliminary injunction, the District Court denied that motion (JA at 1).

The District Court, subsequently, upon respondent Leu and respondent Unions' motions for summary judgment, determined that while the Labor-Management Reporting and Disclosure Act protected petitioners' rights as members of the Union, it did not guarantee them continued employment as employees of the Union (Petition for Writ of Certiorari at A4-A9). The District Court therefore sustained the motion for summary judgment of respondents. The U.S. Court of Appeals for the Sixth Circuit affirmed

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Footnote continued—

of their discharge from their positions as appointed business agents (JA at 3-7). Petitioners at no time sought leave to amend that complaint in the District Court. Similarly, the question on which this Court granted certiorari is limited to the question of whether petitioners' rights under the Labor-Management Reporting and Disclosure Act have been violated by virtue of their discharge as business agents. (*See*, Petition for Writ of Certiorari). Thus, these matters are not properly before this Court, and this portion of petitioners' brief should be disregarded and stricken by the Court. *See, Huffman v. Pursue Ltd.*, 419 U.S. 892 (1974).

the decision of the District Court adopting its reasoning in regard to petitioners' rights of employment as Union employees versus their rights as members of the Union (Petition for Writ of Certiorari at A1-A3). This Honorable Court granted certiorari to determine the issues presented in this case.

SUMMARY OF THE ARGUMENT

The Labor-Management Reporting and Disclosure Act does not protect appointed employees of a labor organization from removal from employment with a union. The provisions of the Act are only applicable to membership rights. Thus, an appointed employee may lawfully be removed from his employment so long as he is not also disciplined in a manner that affects his rights as a member of the union. The provisions of the Act make reference only to the protection of membership rights, and are therefore inapplicable to employment rights. This conclusion is buttressed by the legislative history of the Act which indicates that Congress intended to exclude officers in their capacity as officers from the protections of the Act.

This interpretation of the Labor-Management Reporting and Disclosure Act also comports with the purposes of its enactment by Congress. In enacting the Act, Congress expressed a public interest in the protection of the democratic processes within labor unions. The removal of appointed officers of a union as a result of their expressed political opposition to the elected president of the union furthers the democratic functioning of the union.

In electing an individual as president of the union, the majority of the membership of the union has expressed its approval of that individual's policies and goals for the

union. The membership is therefore entitled to expect that the appointees of that president will carry out the policies which they have endorsed through their vote. Should the membership disagree with the president's actions in regard to the removal of appointees, they may express that dissatisfaction through the electoral process. Thus, the removal of appointees politically opposed to the policies of an elected union president fosters the purposes of the Labor-Management Reporting and Disclosure Act.

Even assuming arguendo that the Act is applicable to appointed agents of a union in their capacity as employees of the union, respondents were properly awarded summary judgment in this case. The petitioners were employees of the union who served at the pleasure of the president and could therefore, be discharged without any reason whatever. Their positions were therefore similar to that of the non-tenured teacher in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Assuming there is a cause of action for the removal of an appointed employee of a union, the standard set by this Court in that case should be applied here. That is, if respondent can demonstrate that petitioners would have been discharged despite their political activities, petitioners have no right to reinstatement. The record in the instant case demonstrates that such is the case.

The standard urged by amici based upon this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 518 (1980) would place unions in the position of being unable to discharge employees, even for entirely legitimate reasons, so long as those employees engage in political activities in opposition to the union administration if their jobs are such that political loyalty is not a necessary prerequisite to the performance of their jobs. This standard should therefore be rejected by the Court.

However, even under the application of the *Branti* standard, respondents were properly awarded summary judgment in this case since petitioners as business agents for the union were of primary importance in implementing the policies of the president of the union. The decision of the United States Court of Appeals for the Sixth Circuit should therefore be affirmed.

ARGUMENT

I. THE DISCHARGE OF APPOINTED UNION BUSINESS AGENTS DUE TO THEIR SUPPORT OF AN OPPOSING CANDIDATE FOR THE PRESIDENCY OF A UNION, DOES NOT VIOLATE THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.

The Congressional purpose in the enactment of the Labor-Management Reporting and Disclosure Act of 1959, was to remedy what Senate hearings revealed to be abuses of power by some union officials which prevented the functioning of those unions in a democratic manner. *See*, 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (NLRB, 1959) (hereinafter cited as Legislative History) at 1096-1199. In order to insure the democratic functioning of unions, Congress, through the enactment of Title I of the Act, entitled, "Bill of Rights of Members of Labor Organizations", sought to guarantee to the rank-and-file members of unions certain rights to freedom of speech, association, and equal rights to participate in the elections and meetings of their unions, 29 U.S.C. Section 411(a)(1) and 411 (a)(2). Congress further provided a means for redress of violations of these rights by granting union members access to the federal courts in order to rectify any fine,

suspensions, expulsion, or other discipline of members in violation of the exercise of their rights guaranteed by the Bill of Rights, 29 U.S.C. Section 412 and Section 529.

The instant case however, does not involve allegations that the rights of union members as members of the union have been infringed upon (JA at 3-7). Rather, this action involves solely a question as to whether appointed union employees may be removed from their employment due to their expressed opposition to a rival candidate and newly elected president of the union. It must be stressed at the outset that petitioners' complaint in the District Court, and the question presented to this Court, present exclusively this question, and do not present any question concerning any deprivation of the membership rights of the petitioners. Two separate theories support the conclusion of the courts below in the instant case.

A. The Labor-Management Reporting and Disclosure Act Does Not Protect Appointed Employees in Their Capacities As Employees of the Union.

Title I of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. Section 401, et seq. provides for certain safeguards of the rights of rank-and-file union members. 29 U.S.C. Sections 411(a)(1) and 411(a)(2) provide that:

> (a)(1) Equal rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

> (2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Section 529 of the Act similarly provides that:

> It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable to the enforcement of this section.

In initially examining the above quoted provisions, it should be noted that they refer exclusively to the rights and remedies of members of a union. Thus, on their face, the provisions of the Labor-Management Reporting and Disclosure Act protect only *membership* rights. While employee members of a union possess the full panoply of rights enunciated in the Act in their capacities as members of the union, on the face of the Act, these rights do not apply to union officials and employees in

their capacities as union employees. *Martire v. Laborers Local Union 1058*, 410 F.2d 32, 70 L.R.R.M. 3378 (3d Cir., 1969), *cert. denied*, 396 U.S. 903 (1969); *Sheridan v. Carpenters Local 626*, 306 F.2d 152, 50 L.R.R.M. 2637 (3d Cir., 1962); *Collins v. International Brotherhood of Electrical Workers Local 1944*, 418 F. Supp. 50, 92 L.R.R.M. 3566 (W.D. Pa., 1976); *Schonfeld v. Penza*, 477 F.2d 899, 83 L.R.R.M. 2020 (2d Cir., 1973) at 83 L.R.R.M. 2023.

This conclusion is buttressed by the available legislative history of the Bill of Rights provisions. Senator McClellan in introducing the amendment to the Labor-Management Reporting and Disclosure Act, which ultimately evolved into the Bill of Rights provision in its present form, consistently stressed the need to protect the rights of rank and file members of unions to criticize and question the officers of their unions. *See*, 2 Legislative History at 1098-1105. Similarly, debate in the Senate of the subsequent Kuchel amendment, which altered the original McClellan proposition, stressed the Senate's interest in protecting the rights of rank and file members. 2 Legislative History, at 1233.

No mention is made of the protection of rights of appointed officials of the union in their continued employment with the union. While amici contend that this omission of all reference to officers indicates that Congress did not intend to exclude them from the protections of the Act in their capacities as officers, a more valid inference is that Congress by its failure to mention officers did not intend to include protection of their status as officers within the Bill of Rights provisions of Title I. Within the provisions of the Act, where Congress intended to make the provisions of the Act applicable to officers of the union, it specifically so stated. *See e.g.*, 29 U.S.C. Section 481. It must therefore be presumed that in other provisions of the Act, the

lack of specific reference to officers indicated an intent on the part of Congress to exclude them from the coverage of those provisions. *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963) at 514-515; *J. Ray McDermott Co., Inc. v. Vessel Manning Star*, 457 F.2d 815 (5th Cir., 1972) at 818.

Additionally, it must be noted that an early version of the "Bill of Rights of Union Members" specifically referred to the protection of the rights of both members and employees of labor organizations. Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 MINN. L. REV. 199 (1960) at 204. Congress later saw fit to exclude this reference to employees in the final form of the statute. Respondent would submit that again, this indicates an intention on the part of the Congress to exclude protection of appointed employees in the retention of their union employment from the provisions of Title I of the Act. *Carey v. Donohue*, 240 U.S. 430 (1916).

Further, the conference report on the Labor-Management Reporting and Disclosure Act of 1959 states in pertinent part that:

> In paragraph (5), relating to safeguards against improper disciplinary action, it should be noted that the prohibition on suspension without observing certain safeguards applies only to suspension of membership in the union; it does not refer to suspension of a member's status as an officer in the union.

1 Legislative History, at 935. Thus, Congress excluded the removal of officers from the definition of "discipline" as the term is used in 29 U.S.C. Section 411(a)(5), and the courts in interpreting that section have uniformly so held. e.g., *Gabauer v. Woodcock*, 520 F.2d 1084, 89 L.R.R.M. 2961 (8th Cir. 1975), *cert. denied*, 423 U.S. 1061 (1976) at 89

L.R.R.M. 2967. Having excluded the removal of an officer from union office from the definition of "discipline" in Section 411(a)(5), it would seem evident that Congress intended the term "discipline" as used in Section 529 similarly to exclude the suspension or removal of appointed officers from their union offices from the prohibitions of that section. Although the Ninth Circuit Court of Appeals has rejected this contention based upon its conclusion that Congress intended the words of the two sections to have different meanings, *Grand Lodge v. King*, 335 F.2d 340, 56 L.R.R.M. 2639 (9th Cir., 1964), *cert. denied*, 379 U.S. 920 (1964) at 56 L.R.R.M. 2642, it is doubtful that Congress would have left such an intention to give identical language two entirely separate meanings totally unexpressed. *Wood v. Dennis*, 49 F.2d 849, 84 L.R.R.M. 2662 (7th Cir., 1972), *cert. denied*, 415 U.S. 960 (1974) at 84 L.R.R.M. 2668 (concurring opinion of Judge Stevens).

The term discipline as used in Section 529 refers only to discipline in interferring with membership rights. In this case petitioners have clearly not been disciplined in their capacities as members of the union and the Bill of Rights provisions are therefore inapplicable here (JA at 14, 18, 20-21, 36-38, 41 and 47-48). While petitioners had a right under the Labor-Management Reporting and Disclosure Act to campaign on behalf of the incumbent Brown slate in the 1977 election, and clearly could not be disciplined in their capacities as members of the union for such activity, the provisions of the Act did not offer them protection in their continued employment as appointed employees of the union as a result of that activity. While the legislative history of the Bill of Rights provisions of the Act is sparse, as is demonstrated above, time and time again the legislative history points toward a congressional intent to exclude coverage of the Act's pro-

tections to employees of unions in their capacities as employees of the union.

B. The Public Interest in the Effective Functioning of Democratic Unions Requires That Elected Union Officials Be Free to Select Appointed Employees Who Will Effectively Carry Out Their Policies and Programs.

As noted above, in the passage of the Labor-Management Reporting and Disclosure Act of 1959, Congress expressed an interest in furthering and preserving the democratic nature of unions in the United States. *See*, 2 Legislative History at 1096-1099. The Act, however, makes no specific reference to the rights of employees of the union in the retention of their employment, but rather, refers only to the membership rights of union members. As a result, a determination of the issue presented to the Court in the instant case must be analyzed in terms of the effect of the discharge of appointed union employees by the elected president of the union upon the purposes of the Act to advance the democratic administration of labor unions. *Wirtz v. Hotel Employees Union, Local 6*, 391 U.S. 492 (1968) at 499.

Respondent would submit that rather than contravening the purposes of the Act, the discharge of appointed business agents, who have expressed their opposition to the elected administration of the union, advances the democratic goals of the Act. The administration of respondent Union is governed by the Bylaws of the Union which are enacted by, and may be amended by, the rank-and-file membership through a referendum (Joint Exhibit 1 at 60-62, R. at 71). Those Bylaws provide that the president of the Union shall be elected by the general membership

of the Union (Joint Exhibit 1 at 14 and 33, R. at 71). Additionally, pursuant to the Bylaws of the Union, the president is authorized to appoint, suspend, discharge and direct business agents (Joint Exhibit 1 at 15-16 and R. at 71).

Thus, the membership of the Union has chosen a form of government for itself which permits the rank-and-file membership to select for its president a candidate with whose policies and plans they agree. In turn, the president is permitted by the Bylaws to appoint individuals to carry out his policies and plans who support those policies pursuant to the mandate of the majority vote of the rank-and-file membership. In this way, rather than stifling the democratic process, the democratic process is advanced by insuring to the membership that their elected officers are able to carry out the mandate which they have been given pursuant to the electoral process.

> An appointed union officer, selected by and subject to dismissal by an elected one, may be presumed to contravene the will of the membership when he contravenes the policies of its elected officers. . . . (S)izable minorities may disagree with these policies but the remedy for this disagreement is available through the electoral processes. Furthermore, the policies of the Act in favor of union democracy are actually *advanced* by permitting elected officers to freely select and remove their appointees, since such selection and removal is the only means of implementation of the majority will and policy.

Cehaich v. International Union, UAW, 496 F. Supp. 912, 105 L.R.R.M. 3210 (E.D. Mich., 1980) at 105 L.R.R.M. 3213; *See also, Wambles v. International Brotherhood of Teamsters*, 488 F.2d 888, 85 L.R.R.M. 2328 (5th Cir., 1974) at 85 L.R.R.M. 2329; *Sewell v. Grand Lodge, IAM*, 445 F.2d 545,

77 L.R.R.M. 2916 (5th Cir., 1971).[3] Should the membership become dissatisfied with the decisions of their elected president in this regard, they may again exercise their rights to either elect a different president, or amend their Bylaws in order to provide another method for the selection of business agents. *Cehaich v. International Union, UAW, supra,* at 105 L.R.R.M. 3215. Thus, an interpretation of the Act which permits the elected president of the union to terminate the employment of appointed employees who oppose his policies, in fact, furthers the intent of Congress to insure the vitality of the democratic process within labor organizations.

It should be noted that in the instant case respondent Leu campaigned vigorously upon the issue for better representation of the membership which, under the previous Brown administration, was the primary responsibility of petitioners as appointed business agents (JA at 12, 13, 14 and 23-25). Respondent Leu was elected on this platform, and thus was given a mandate by the membership to do that which he felt was necessary to improve the representation of the membership. In respondent Leu's opinion this necessitated the removal of petitioners from their employment. Thus, in the circumstances presented by

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3. Petitioners contend that the United States Court of Appeals for the 5th Circuit limited its holding in *Wambles* in its subsequent decision in *Miller v. Holden*, 535 F.2d 912, 95 L.R.R.M. 2152 (5th Cir., 1976). A close reading of the latter case, however, indicates otherwise. In *Miller*, the district court dismissed the plaintiff's complaint upon the basis of lack of jurisdiction over the subject matter. *Miller v. Holden*, at 95 L.R.R.M. 2153. The court of appeals determined that while its decisions in *Wambles v. International Brotherhood of Teamsters* and *Sewell v. Machinists* might well be controlling upon the merits of the case, the district court clearly had jurisdiction over a claim by a union employee for an alleged violation of his *membership* rights pursuant to 29 U.S.C. Section 412. *Miller v. Holden*, at 95 L.R.R.M. 2155-2156. Ultimately, the district court upon remand granted summary judgment for the defendants in that case. *Miller v. Holden*, 95 L.R.R.M. 2156 (M.D. La., 1977).

the instant case, it is evident that the purposes of the Act to promote the democratic functioning of labor unions were furthered by permitting respondent Leu to remove the petitioners from their employment. In this manner, he was able to fulfill his campaign commitments which were endorsed by the majority of the membership of the Union.

Petitioners in support of their contention that the Labor-Management Reporting and Disclosure Act should be interpreted to preclude the discharge of appointed employees who actively oppose the president of the union, rely heavily upon the decisions of several Courts of Appeal which are clearly distinguishable from the instant case. *Bradford v. Textile Workers of America Local 1093*, 563 F.2d 1138, 96 L.R.R.M. 2690 (4th Cir., 1977); *Wood v. Dennis*, 489 F.2d 849, 84 L.R.R.M. 2662 (7th Cir., 1972), *cert. denied*, 415 US. 960 (1974); *Cooke v. Orange Belt District Council*, 529 F.2d 815, 91 L.R.R.M. 2349 (9th Cir., 1976); *Gabauer v. Woodcock*, 520 F.2d 1084, 89 L.R.R.M. 2961 (8th Cir., 1975), *cert. denied*, 423 U.S. 1061 (1976); *Lamb v. Miller*, ... F.2d ....., 107 L.R.R.M. 3064 (D.C. Cir., 1981); *Maceira v. Pagan*, 649 F.2d 8, 107 L.R.R.M. 2408 (1st Cir., 1981). In each of these cases the Court determined that the removal or transfer of a union officer due to his political opposition to other incumbent officers of the union violated the provisions of the Act. However, in each of these cases, an *elected* officer was unilaterally removed from his position by another elected officer as a result of his political activities.

Unlike the removal of appointed employees who oppose the policies of the elected union administration, which furthers the democratic purposes of the Labor-Management Reporting and Disclosure Act, the unilateral removal of officers duly elected by the membership frustrates the intent of the Act. Appointed employees can be expected to be supportive of the elective officials by whom they are ap-

pointed, as explained above. However, an elected officer, whether he agrees with other elected officers of the union or not, must be able to express the policies and views which prompted his election to office by the membership. If such an elected official may be unilaterally removed from office due to his opposition to other officers, democratic processes are rendered meaningless by virtue of the emasculation of the efficacy of the vote of the membership. Additionally, the officers' membership right in holding elected office is infringed upon. 29 U.S.C. Section 481. Elected officers are afforded protections by Section 481 in order to protect their membership right to hold elective office. Congress did not afford appointed business agents these protections.

Thus, when analyzed in terms of the purposes of the Act, a clear distinction arises between the discharge of an appointed versus elected union official. *See, Bradford v. Textile Workers of America, Local 1093,* 563 F.2d 1138, 96 L.R.R.M. 2690 (4th Cir., 1977); *Wood v. Dennis,* 489 F.2d 849, 84 L.R.R.M. 2662 (7th Cir., 1972) at 84 L.R.R.M. 2668 (concurring opinion); *Cehaich v. International Union, UAW,* 496 F. Supp. 912, 105 L.R.R.M. 3210 (E.D. Mich., 1980); *Witte v. Myers,* 343 F. Supp. 873, 81 L.R.R.M. 2340 (W.D. Mich., 1971). This line of authority therefore lends little support to petitioners' contention that the discharge of appointed union business agents due to their political opposition to the policies of elected officers offends the democratic principles espoused by Congress in enacting the Act.

The rationale of the courts in the only decisions cited by petitioners which involved the discharge of appointed union officers, *Grand Lodge v. King,* 335 F.2d 340, 56 L.R.R.M. 2639 (9th Cir., 1964), *cert. denied,* 379 U.S. 920 (1964) and *Retail Clerks Union, Local 648 v. Retail Clerks International Association,* 299 F. Supp. 1012, 70 L.R.R.M.

3366 (D.C. D.C., 1969), should not be adopted by this Court. In each of these cases, the Court gave no consideration whatever to the democratic principles which are advanced by permitting elected officials to select appointees who are supportive of their policies. These cases rather, rely solely upon the presumed detrimental effect upon union democracy which allegedly results from the discharge of appointed employees who actively opposed the policies of the elected administration. *Grand Lodge v. King, supra* at 56 L.R.R.M. 2641; *Retail Clerks Union, Local 648 v. Retail Clerks International Association, supra* at 70 L.R.R.M. 3371.

Such a deleterious effect should not be presumed. Whether the rank-and-file membership of the union will live in fear of exercising their rights under Section 411 due to the discharge of an appointed union employee is at best highly speculative. There is no indication in either of these cases that in fact such a result occurred. Thus, the only clear effect of the discharge of an appointed union employee is to prevent appointed employees who oppose the policies of the elected officers from voicing their opposition while they remain on the union payroll. Clearly their opposition will not be stifled by virtue of their right to continue to voice their opinions as members of the union. This effect of such discharges must be balanced against the benefits to the furtherance of democratic goals when elected officers are permitted to hire appointees who will support those officers' policies for the union pursuant to the mandate of the electorate. Respondent would submit that the benefits far outweigh any detrimental effects of such discharges, and the rationale of these cases must therefore be rejected.

Additionally, in neither *Grand Lodge* nor *Retail Clerks* did the Court examine the Bylaws of the union involved in

order to determine whether the membership of the union had granted its president authority to remove appointed employees. Here, the membership of the respondent Union has determined that its president should be given this authority in order that he may implement the policies to which they have given their approval. This consideration was not addressed in *Grand Lodge* or *Retail Clerks*. Thus, the cases are further distinguishable from the instant case on that basis.

Amici in turn contend that elected officials of a union must not be permitted to remove appointed employees who oppose their policies and programs for the reason that these employees are allegedly the only source from which effective opposition may emanate due to the lack of a permanent opposition party in most unions. Amici contend that the continued employment of these employees is for this reason necessary to further the democratic intentions of the Bill of Rights provisions of the Act (Brief of Amici Curiae at 7-13). This contention flies in the face of the facts of the instant case. An effective opposition party has existed within the respondent Union at all times since 1974 (JA at 8-9). In fact, respondent Leu in this case successfully opposed the incumbent Brown administration in the 1977 election which ultimately gave rise to this litigation (JA at 9). This argument by amici further ignores the fact that the membership of the Union has authorized the president to discharge appointed business agents pursuant to the Bylaws. Thus, this contention seeks to have this Court determine this case upon a broad contention that is not applicable to the facts of this case.

Additionally, the contention of the amici ignores the reality of union politics and administration. The issue presented in this case cannot be analyzed in a hypothetical vacuum. The petitioners in this case made it eminently clear through both their vigorous campaign activities for

the Brown slate, and through their actions in carrying out their job duties under the Brown administration, that they were diametrically opposed to both the plans and policies of respondent Leu for the Union (JA at 23-24).[4]

To hold that respondents were required to continue the employment of petitioners as appointed business agents under the new Union administration until such time as they manifested some overt grounds for discharge, or until such time as they retired, would mean that petitioners could remain on the Union payroll indefinitely while undermining the Union administration so as to render it ineffective and thus insure the election of their own candidate in the next election. Such a result, which would undermine the effective administration of the union for the benefit of its members, cannot be tolerated in the name of union democracy. *See, Wambles v. International Brotherhood of Teamsters,* 488 F.2d 888, 85 L.R.R.M. 23, 28 (5th Cir., 1974); *Newman v. Local 1101, Communication Workers of America,* 570 F.2d 439, 97 L.R.R.M. 2606 (2d Cir., 1978); *Sewell v. Grand Lodge IAM,* 445 F.2d 545, 77 L.R.R.M. 2916 (5th Cir., 1971). Appointed union employees in this manner would be granted far greater protections in both the exercise of their political rights under the Act and in their employment than was ever contemplated by Congress in enacting the Bill of Rights provisions. *Wambles v. Teamsters,* at 85 L.R.R.M. 2330.

The political realities of the administration of unions and the functioning of labor organizations so as to further the democratic purposes of the Labor-Management Reporting and Disclosure Act demand that elected union officers be permitted to remove appointed employees of the union

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4. Although petitioners claimed that they "pledged support" to the new president of the union this alleged pledge of support was never communicated to respondent Leu, and petitioners continued opposition to the Leu presidency is apparent (JA at 11, 22-23, 48-49).

who advocate policies in contravention to the policies of the elected officers which have received the mandate of the rank-and-file membership. This Court has recognized "the general congressional policy to allow unions great latitude in resolving their own internal controversies". *Calhoon v. Harvey*, 379 U.S. 134 (1964) at 140. That general congressional policy is best advanced by permitting the rank-and-file membership of a union to determine whether or not it agrees with the decisions of its elected leaders in this regard through the democratic electorial process. The democratic purposes of the Act are not served by thrusting upon the membership appointed employees who do not represent their interests as demonstrated by the vote of the majority.

II. ASSUMING ARGUENDO THAT THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT PROTECTS THE EMPLOYMENT INTERESTS OF APPOINTED EMPLOYEES OF A UNION, SUMMARY JUDGMENT WAS PROPERLY AWARDED TO RESPONDENTS IN THE INSTANT CASE.

Assuming arguendo that the provisions of the Act do provide protection to appointed business agents so as to prevent their removal from appointed union employment due to their support of policies which contravene those of the elected administration, respondent would submit that the decision of the U.S. Court of Appeals for the Sixth Circuit must still be affirmed in this case.[5] As previously

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5. Amici have put before this Court an elaborate scheme which they contend should be utilized in determining whether the discharge of an appointed union employee violates Title I of the Labor-Management Reporting and Disclosure Act (Brief of Amici Curiae at 13-19). Respondents therefore find it necessary to present this argument in the event that the Court should find it necessary to reach this question.

noted, business agents within respondent Union are appointed by the president of the Union, and serve at the pleasure of the president (Joint Exhibit 1 at 15 and R at 71). The appointed business agents of the Union therefore, may be discharged for any or no reason. Assuming arguendo that the Act protects employment rights, it is only when the grounds for their discharge run afoul of the provisions of the Act that appointed officers may be provided with some protection against the termination of their employment.

This situation is analogous to the situation before this Court in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). That case involved a claim by a non-tenured teacher that his teaching contract with the Board of Education had not been renewed due his exercise of his First Amendment rights to freedom of expression. Doyle having not attained tenured status, his contract could have been non-renewed by the Board of Education for no reason whatever. *Mount Healthy v. Doyle*, at 283. The Court however, determined that if it could be demonstrated that the reason for the Board of Education's decision to not reemploy Doyle turned upon the exercise of his First Amendment rights, Doyle should be reinstated to his employment. *Mount Healthy v. Doyle*, at 283.

In determining the burden of proof necessary to establish a right to reinstatement, the Court stated that:

> A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.

Mount Healthy v. Doyle, at 285. The Court placed the burden of proof upon plaintiff to demonstrate that constitutionally protected conduct played a substantial role in the decision not to reemploy him, which showing could be rebutted by a demonstration that the employer would have reached the same result regardless of the exercise of any constitutionally protected rights. *Mount Healthy v. Doyle,* at 287.

In the event the Court should determine that petitioners' employment with the Union is protected by the Act, and respondents again urge that it is not, the *Mount Healthy* standard is one which may be controlling in the instant case. Petitioners having no right to continued employment as business agents, they, like the teacher in *Mount Healthy,* are subject to discharge without reason. Thus, they should not be placed in a position whereby they can insure their indefinite employment by engaging in political activity when no such right to continued employment would otherwise exist.

In applying this standard to the facts of the instant case, it is clear that the courts below properly awarded summary judgment for respondents. Respondent Leu in his campaign for the presidency of the Union, campaigned vigorously upon the issue of better representation for the membership of the Union (JA at 14 and 23-25). Prior to his election as president, Leu observed the activities of petitioners, and found their job performance in this area to be inadequate (JA at 24 and 27). This observation accounted for his decision to discharge petitioners from their employment (JA at 22-23 and 24). Thus, petitioners' employment with the union would have been terminated regardless of their political activities on behalf of the incumbent slate. Summary judgment was thus properly awarded to respondents in this case.

Amici spend a large portion of their brief proposing a standard for the discharge of appointed employees who engage in political expression pursuant to the proviso of Section 411(a)(2) (Brief of Amici Curiae at 13-19). It must first be noted that the proviso to Section 411(a)(2), which provides that unions may adopt and enforce rules as to the responsibility of members to refrain from conduct which would interfere with the union's legal and contractual obligations, is entirely inapplicable to the instant case. The instant action presents a question in regard to whether appointed employees may be lawfully removed from employment. At no time in the courts below did either the petitioners or respondents contend that petitioners were discharged pursuant to any rule of respondent Union promulgated pursuant to the proviso of Section 411(a)(2). Rather, on the facts presented by this action, the issue before this Court is whether the Act protects appointed employees of a union in their capacities as employees of the union. Amici, through this argument, attempt to interject an issue into this case not presented in the courts below, and therefore not properly before this Court. Since the facts of this case do not present any issue concerning the application of the proviso to Section 411(a)(2), any decision giving meaning to the proviso would be advisory in nature. Thus, the test proposed by amici is not relevant in the instant case, and should be rejected by the Court.[6]

Likewise, amici urge that this Court adopt a test for determining the propriety of the discharge of appointed union employees pursuant to which unions would be required to demonstrate that political loyalty to the policies of the

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6. Since the standard proposed by amici is entirely irrelevant to this action, respondents have chosen not to address that proposed standard in its entirety.

elected union administration is a necessary prerequisite to the fulfillment of the responsibilities of the particular job in question (Brief of Amici Curiae at 17-19). This standard would, however, permit union employees in many cases, to effectively insure themselves of lifetime employment by engaging in political activities in opposition to the union administration. This would place unions in the untenable position of being virtually unable to replace employees whose jobs do not require political loyalty for any reason, whether legitimate or not, so long as those employees engage in political activities. This standard should therefore be rejected by the Court.

Respondents would submit however, that even under this standard, respondents were properly awarded summary judgment in this case. Amici rely upon the cases of *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980) in support of their argument for the applicability of the standard set forth above in the instant case. These cases however, are clearly distinguishable from the instant one. The Court in both *Elrod* and *Branti* specifically determined that the job duties of the employees involved in no way encompassed duties which indicated that political support for the incumbent officeholder was necessary to the performance of those duties. *Elrod v. Burns*, at 351; *Branti v. Finkel*, at 519. As illustrative of a situation in which party affiliation might be a necessary prerequisite to the maintenance of public employment, the *Branti* Court observed that:

> (T)he Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments. In sum, the ultimate inquiry is not whether the label 'policymaker' or 'con-

> fidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti v. Finkel, 445 U.S. 507 (1980) at 518.

Additionally, both *Elrod* and *Branti* involved the removal of public employees from their employment for the sole reason that their political affiliations were different from those of the newly elected incumbent under whom they worked. In neither case had the employees involved expressed an unwillingness to carry out the policies of their superiors. *Elrod v. Burns*, at 351; *Branti v. Finkel*, at 510. In the instant case however, the petitioners have clearly expressed their opposition to the presidency and policies of respondent Leu (JA at 11, 22-23, and 48-49).

Assuming arguendo that this standard should be applied to the instant case, it is clear that petitioners are employees of whom party affiliation or support could be required. Although appointed business agents of the respondent union do not participate in the making of policy for the union, they have primary responsibility for the effectuation of the policies and programs of the president of the union (JA at 12-13). They, like the hypothetical assistant to the governor of a state in *Branti*, must necessarily support the policies and programs of the president of the union in order to adequately and fully perform their jobs. Thus, under the standard urged by the amici, respondents were properly granted summary judgment in this case.

Thus, even assuming arguendo that petitioners could not lawfully have been removed from their employment as appointed business agents for the respondent union by virtue of their political activities, their removal was lawful in the circumstances of the instant case.

CONCLUSION

For all the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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